FIX-IT-FIRST: A SEISMIC SHIFT IN U.S. ANTITRUST AGENCY APPROACHES TO MERGER REMEDIES

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Under their current leadership, the U.S. federal antitrust agencies have shown antipathy to resolving merger investigations through remedy undertaking that are embodied in consent decrees, preferring instead to seek to prohibit transactions outright. This sea change in merger enforcement policy is leading merging parties increasingly to contemplate "fix-it-first" strategies, whereby the parties modify the proposed transaction to address antitrust concerns — typically by reaching an agreement with a buyer of assets to be divested — without entering a consent decree with the agency. The agency is then left with the choice of either clearing the transaction or litigating over the adequacy of the remedy. In this article, we discuss the background and implications of the agencies' new positions and the potential benefits and challenges of a fix-it-first strategy for merging parties.

I. INTRODUCTION

Until recently, the U.S. antitrust agencies commonly resolved concerns regarding proposed mergers by entering a consent decree with the merging parties that included remedies. The merging parties might sell off overlapping assets or make behavioral commitments to address agency concerns, but the transaction would be allowed to proceed. Senior officials at the U.S. Department of Justice Antitrust Division ("DOJ") and the U.S. Federal Trade Commission ("FTC"), however, have now made clear that their agencies will no longer entertain or will sharply limit resolutions through consent decrees with remedies, preferring to challenge transactions outright. The agencies' new positions on remedies have dramatically changed the U.S. merger review landscape for transactions that potentially raise antitrust concerns, leading parties to such transactions increasingly to contemplate "fix-it-first" strategies. With fix-it-first, the parties modify the transaction to address antitrust concerns, typically by entering an agreement with a third party to sell divested assets, without entering a consent decree with the agency. The agency can then either clear the transaction based on the proffered remedy or litigate over the remedy's adequacy and sometimes over whether the transaction may lessen competition in the first place.

II. BACKGROUND

The U.S. antitrust agencies' antagonism toward negotiated remedies in merger cases is a new phenomenon. Prior agency regimes scrutinized remedy proposals extremely closely to satisfy themselves that the remedy — e.g. the scope of the asset package and proposed buyer for a divestiture — would fully replicate the intensity of pre-transaction competition. The agency remedy review process often led to significant changes in the proposed remedy as a condition to clearing the transaction with a consent decree. Nevertheless, a large proportion of those transactions that the agencies concluded otherwise would violate the antitrust laws were cleared through a negotiated remedy embodied in a consent decree.

The U.S. antitrust agencies now have very different postures on merger remedies. In a January 2022 speech, Assistant Attorney General for DOJ's Antitrust Division Jonathan Kanter said that he was "concerned that merger remedies short of blocking a transaction too often miss the mark."[2] Kanter went on to say that "in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction."[3] Since Kanter's speech nearly two years ago, DOJ has agreed to resolve a merger case through a consent decree only once.[4] And that was during litigation after the court had shown a willingness to consider the parties' fix-it-first remedy.[5] DOJ is currently litigating over the sufficiency of proposed fix-it-first remedies after rejecting JetBlue and Spirit's proposal to resolve antitrust concerns regarding their proposed merger by divesting assets at certain airports.[6]

FTC leaders have voiced similar views. In a June 2022 interview, FTC Chair Lina Khan said that the pattern of negotiating with merging parties to "fix" their transactions is "not work the agency should have to do. That's something that really should be fixed on the front end by parties being on clear notice about what are lawful and unlawful deals."[7] Khan added, "We're going to be focusing our resources on litigating, rather than on settling."[8] In February 2023, former FTC Bureau of Competition Director Holly Vedova said that the FTC was moving "away from . . . remedies with 'numerous, complicated, and long-standing entanglements.'"[9] Vedova stated that "[b]ased on our own experience and study . . . [t]he Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a

2 Jonathan Kanter, Assistant Att'y Gen., US Dep't of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section, (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

3 *Id.*

4 See Press Release, US Dep't of Justice, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum.

5 Bryan Koenig, *Assa Abloy Judge Questions "Unreal World," Review Gaming, Law*360 (Mar. 14, 2023), https://www.law360.com/articles/1585871.

6 Plaintiffs' Pretrial Brief at 28-29, *United States v. JetBlue Airways Corp.*, No. 1:23-cv-10511-WGY (D. Mass. Oct. 30, 2023).

7 Margaret Harding McGill, *FTC's new stance: Litigate, don't negotiate*, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

8 *Id.*

9 Holly Vedova, Bureau of Competition Director, Fed. Trade Comm'n, Update from the FTC's Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

standalone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner."[10] She said the Bureau of Competition "will no longer consider remedies where there is a heightened risk of failure. These include proposals of less than standalone business units, or where there are forward-looking entanglements between the buyer and seller, such as supply agreements, or where there is no strong independent buyer."[11]

The FTC has in practice been far less absolutist than DOJ: it has approved ten consent decrees with remedies to resolve merger cases since the beginning of 2022. Nevertheless, it is clearly articulating a more restrictive approach than past FTC regimes toward resolving merger cases through consent decrees. For instance, many merger cases have traditionally been resolved through divestitures of less than a standalone business. In the FTC's March 2023 complaint challenging Intercontinental Exchange, Inc.'s proposed acquisition of Black Knight, however, the FTC alleged that the merging parties' proposed divestiture did not fix the acquisition's anticompetitive effects because, among other things, the remedy failed "to transfer a standalone business" to the proposed divestiture buyer.[12] The FTC ultimately agreed to settle the case after the parties agreed to a broader remedy that included Black Knight's Optimal Blue and Empower businesses.[13]

In practice, if the FTC will not clear transactions with a consent decree based on a divestiture of less than a standalone business, there will be many circumstances in which the parties cannot practicably negotiate a consent decree, which likely will increase the number of FTC-reviewed transactions for which the parties will need to consider a fix-it-first remedy. In September 2023, the FTC did accept a consent decree during preliminary injunction litigation to resolve its attempt to block Amgen Inc.'s ("Amgen") proposed acquisition of Horizon Therapeutics plc. ("Horizon") based on conglomerate concerns. The remedy prohibits Amgen from bundling its drugs with certain legacy Horizon drugs or offering certain types of contract terms or rebates.[14] Given that *Amgen/Horizon* involved an unusual theory of competitive harm, however, it is unclear whether the FTC will deviate from its announced policy of requiring divestitures of a standalone business in more mainstream cases.

III. IMPLICATIONS OF THE NEW REMEDY POLICIES

The antitrust agencies' new approaches to remedies have important real-world implications for merging parties. Among other things, parties are increasingly contemplating fix-it-first strategies. Those can involve divesting assets to an identified buyer with a negotiated transaction agreement during the agency's review but could also involve consummating a transaction to address potential antitrust objections before submitting a Hart-Scott-Rodino notification. For example, Quikrete and Forterra entered a merger agreement in February 2021,[15] and after receiving a DOJ second request, Forterra entered a series of divestiture agreements with third parties in late 2021 and early 2022 "[i]n order to address some of the divestitures anticipated to be required by the DOJ[.]"[16] A year after signing their merger agreement, Quikrete and Forterra closed the transaction without a consent decree,[17] and DOJ has not challenged the transaction to date.[18] In November 2022, Columbia Banking System, Inc. announced that it agreed to divest ten of its bank branches in California, Washington, and Oregon "to satisfy commitments to DOJ in connection

10 *Id.*

11 *Id.*

12 Complaint, In the Matter of Intercontinental Exchange, Inc., FTC Docket No. 9413, https://www.ftc.gov/system/files/ftc_gov/pdf/d09413icebkp3complaintredacted.pdf.

13 *Id.*; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Resolving Antitrust Concerns Surrounding ICE, Black Knight Deal (Nov. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-approves-final-order-resolving-antitrust-concerns-surrounding-ice-black-knight-deal.

14 Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

15 Forterra SEC 8-K Filing (Feb. 19, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000119312521049979/d136987d8k.htm.

16 Forterra SEC 8-K Filing (Nov. 24, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000078/frta-20211124.htm; Forterra SEC 8-K Filing (Dec. 13, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000082/frta-20211213.htm; Forterra SEC 8-K Filing (Feb. 16, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846322000013/frta-20220216.htm.

17 Austin Peay & Jenna Ebersole, *Quickrete-Forterra deal received US DOJ sign-off with divestitures without formal settlement*, MLEX (Mar. 30, 2022), https://content.mlex.com/#/content/1368296; Press Release, Quickrete Completes Acquisition of Forterra, Inc., GLOBENEWSWIRE (Mar. 18, 2022), https://www.globenewswire.com/news-release/2022/03/18/2406267/0/en/Quikrete-Completes-Acquisition-of-Forterra-Inc.html.

18 At a conference in March, a DOJ official said that allegations of "some kind of shadow consent decree approval process" were "categorically false." Bryan Koenig, *DOJ Merger Enforcer Denies 'Shadow' Settlements, LAW* 360 (Mar. 29, 2023), https://www.law360.com/competition/articles/1591383?nl_pk=df3b1b8f-689a-47e5-bd50-1e4207a95f49&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-30&nlsidx=0&nlaidx=0.

with Columbia Banking System's pending merger with Umpqua."[19] The parties closed their transaction in February of 2023 after entering into a "Letter of Agreement" — rather than a formal consent decree — with DOJ.[20] Perhaps tellingly, DOJ did not publicize this resolution.

Data from 2022 — the first full year the current agency leadership was in place — suggest that the agencies' new positions on remedies are changing how merger reviews of controversial transactions are resolved in practice. On the one hand, DOJ and the FTC, combined, sued to block 10 mergers in 2022 (*more* than in any year since at least 2011). But on the other hand, only 20 transactions (*fewer* than in any year since 2018) led to agency litigation, a consent decree, or a reported abandonment. This is too small a sample size from which to draw definitive conclusions, but the data appear to indicate that, as one would expect, the agencies are litigating more merger cases because they are less willing to resolve antitrust concerns through consent decrees. At the same time, however, fewer transactions are resulting in agency action or abandonment because with the agencies unwilling or reluctant to enter consent decrees, they seem to be allowing more deals to proceed unchallenged in consideration of a fix-it-first remedy or by determining not to take any action regarding transactions that might have resulted in consent decrees in the past.

Finally, there are preliminary suggestions that where the parties have agreed to a credible fix-it-first remedy in an appropriate way, courts will be receptive to denying an injunction based on the remedy. There are indications, however, that courts are likely to insist on two things to deny a preliminary injunction based on a fix-it-first remedy proffer. **First**, they will require that the remedy scope (e.g. the package of assets to be divested and the proposed asset buyer) likely will replicate pre-merger competition or at least come close. For instance, the parties in *United/Change* successfully convinced the court that United's proposed divestiture of Change's ClaimsXten to TPG would replace pre-merger competition in the market for first-pass claims editing software, which health insurers use to determine whether a claims should be paid.[21] Relying on testimony from a TPG executive, the court determined that TPG had "the experience necessary to compete effectively" and "the scope of the divestiture [was] sufficient to preserve competition."[22] **Second**, a court will require that the merging parties have given the agency sufficient opportunity to investigate the proposed remedy — either during the merger investigation or sufficiently early in the litigation process — so that the agency has the evidence it needs to litigate over the adequacy of the remedy if it chooses to do so. Indeed, during the litigation of DOJ's challenge to the proposed merger of ASSA ABLOY and Spectrum Brands, the court asked the parties why they had waited until shortly before litigation to propose their remedy to DOJ, observing, "[w]e don't want to incentivize companies to basically wait on the divestiture."[23] As mentioned, however, DOJ ultimately entered a consent decree to resolve that challenge. In *FTC v. Ardagh*, the district court refused to hear evidence of a proposed divestiture offered after the close of fact discovery in part because the merging parties had not given the FTC sufficient time to evaluate it.[24]

IV. POTENTIAL SOLUTIONS AND CHALLENGES FOR MERGING PARTIES

The agencies' apparent unwillingness, or at least great reluctance, to rely on traditional merger remedies introduces new variables into pre-transaction planning and antitrust review strategy for parties facing transactions that may raise competition concerns in the United States. (Non-U.S.

19 Press Release, Columbia Banking System, Columbia Banking System Announces Agreement to Sell Three Branches in Northern California to First Northern Bank (Nov. 11, 2022), https://www.columbiabankingsystem.com/news-market-data/press-releases/press-release/2022/COLUMBIA-BANKING-SYSTEM-ANNOUNCES-AGREEMENT-TO-SELL-THREE-BRANCHES-IN-NORTHERN-CALIFORNIA-TO-FIRST-NORTHERN-BANK/default.aspx; Press Release, Columbia Banking System, Columbia Banking System Announces Agreement to Sell Seven Washington and Oregon Branches to 1st Security Bank (Nov. 7, 2022), https://www.columbiabankingsystem.com/news-market-data/press-releases/press-release/2022/COLUMBIA-BANKING-SYSTEM-ANNOUNCES-AGREEMENT-TO-SELL-SEVEN-WASHINGTON-AND-OREGON-BRANCHES-TO-1ST-SECURITY-BANK/default.aspx.

20 Columbia Banking System, Inc., SEC 8-K Filing (Feb. 28, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/887343/000119312523056342/d413616d8k.htm; Umpqua Bank, Summary of DOJ's Letter of Agreement with Umpqua and Columbia, https://www.umpquabank.com/globalassets/media/documents/regulatory-update.pdf.

21 *United States v. UnitedHealth Group*, No. 1:22-cv-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 19, 2022).

22 *Id.* at *11, 13.

23 Bryan Koenig, "Assa Abloy Judge Questions 'Unreal World,' Review Gaming," Law360 (Mar. 14, 2023), https://www.law360.com/competition/articles/1585871?nl_pk=99a13b08-0a7e-4b99-81ea-cbebced10614&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-15&nlsidx=0&nlaidx=3.

24 See Pre-Hearing Conference Transcript, *FTC v. Ardagh*, No. 13-1021 (D.D.C. 2013) at Tr. 13:19-25, 29:10-15 ("Let me tell you right now, I do not believe that that can be thoroughly investigated in three weeks between now and my hearing. I just don't see it. I just don't think the negotiations are far enough along the line, and I don't think it's fair to the other side to ask them to do that."); see also *Chemetron Corp. v. Crane Co.*, No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. Sept. 8, 1977) (refusing to consider evidence of a remedy proposal submitted during a preliminary injunction hearing).

antitrust authorities appear to be continuing their traditional practices of evaluating proposed remedies and clearing transactions subject to remedial undertakings if they find the remedy adequate.) Where there is a remedy that is workable as a business matter and consistent with deal objectives, a fix-it-first remedy can be the keystone for a successful approach. Further, a well-considered fix-it-first strategy can bring several potential benefits and even result in a more favorable outcome than under the traditional approach of negotiating a consent decree with the agency. These benefits include: (i) decreasing the likelihood of prolonged antitrust litigation (on the possibility that the agency may decline to litigate the adequacy of the remedy), thereby shortening the transaction timeline; (ii) providing upfront certainty regarding the scope of the divestiture and avoiding the traditional agency remedy review process, which sometimes can lead to a demand for a broader remedy; (iii) avoiding the compliance burdens of an agency consent decree — for example, being subject to enter into an FTC "prior approval" provision, requiring the merging parties to seek approval from the agency before making future acquisitions in at least the market where the FTC alleges harm to competition, which the FTC is now requiring in all merger consent decrees; and (iv) in some cases, particularly where the fix-it-first divestiture sale process occurs before the primary transaction is announced or relatively early in the agency review process, avoiding a fire sale at depressed prices at the end of the merger review process.

Notwithstanding these potential benefits, a fix-it-first strategy can be difficult to execute. Accordingly, parties contemplating a merger that may raise antitrust concerns should closely examine the need for and the potential advantages and disadvantages of pursuing a fix-it-first strategy at the earliest stages of deal consideration. Among other things, parties should carefully assess the significance of the assets that may have to be divested to the deal objective and practical challenges for a potential divestiture or other remedy, including whether it is feasible to extract selected assets from the rest of a merging party's business that enable a divestiture to compete effectively without unduly impairing retained assets, and whether there are capable potential buyers who will be interested in the divested assets. The parties should also consider the potential timelines for completing the transaction with and without a fix-it-first remedy and the consequences to, and rights and remedies of, the parties if the transaction is blocked, notwithstanding a fix-it-first strategy.

If the parties decide to employ a fix-it-first strategy, timing considerations will be critical. There may well be difficult decisions to make regarding the balance between seeking to persuade the agency — or ultimately a court — that the transaction will not harm competition at all or in a particular market and beginning the sales process to reach agreement with a divestiture buyer — which can take several months — to minimize closing delays or the risk of going past the transaction's end date. The buyer may have incentives to try to minimize the scope of the divestiture, while the seller likely will be focused on maximizing deal certainty and expediting closing. Whether one is the buyer or the seller, it is crucial to give careful attention to these potential tensions in negotiating deal terms such as regulatory efforts clauses, remedy commitments, the end date, and reverse termination fees. The merging parties should ensure that the regulatory provisions in the applicable transaction documents faithfully reflect the parties' understanding of these critical topics.

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